

**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF PENNSYLVANIA**

**JOSEPH LEE OLLIE,**  
**Plaintiff,**

**v.**

**JOHN LUBAHN, M.D., et al,**  
**Defendants.**

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**C.A. No. 18-72 Erie**

**District Judge Susan Paradise Baxter**

**MEMORANDUM ORDER**

This prisoner civil rights action was received by the Clerk of Court on May 5, 2018 and was referred to the undersigned, then a United States Magistrate Judge, for report and recommendation in accordance with the Magistrates Act, 28 U.S.C. § 636(b)(1), and Rules 72.1.3 and 72.1.4 of the Local Rules for Magistrates.

Defendants Patrick Smith, M.D. and John Lubahn, M.D., subsequently filed motions to dismiss on August 8 and 9, 2018, respectively [ECF Nos. 22, 24], to which Plaintiff failed to file a substantive response. The Plaintiff did, however, file a document entitled “Plaintiff’s first amended complaint” [ECF No. 35], purportedly in response to the Court’s Order of August 21, 2018, which states that “In response to the motions to dismiss, Plaintiff may file a proposed amendment to the complaint in order to cure any procedural defects.” [ECF No. 26]. This document sought to add four additional defendants: Saint Vincent Medical Hospital (“St. Vincent”); UPMC Medical Hospital (“UPMC”); and two unnamed defendants, referred to as “John Doe, Physician Assistant Anesthesiologist,” and “John Doe Medical Doctor Physician Assistant,” respectively. Although this document should have been received only as a proposed

amendment, the Clerk mistakenly docketed it as Plaintiff's amended complaint and added the four proposed additional defendants as Defendants in the caption of this case. As a result, Defendant Lubahn filed a motion to strike amended complaint [ECF No. 37], arguing that the amendment was filed more than 21 days after service of the original complaint, without leave of court, in violation of Rule 15(a)(1)(B) of the Federal Rules of Civil Procedure.

On September 14, 2018, the undersigned was sworn in as a United States District Judge. This action was reassigned to the undersigned, as presiding judge, on September 18, 2018, and was thereafter assigned to United States Magistrate Judge Richard A. Lanzillo for all pretrial proceedings on September 28, 2018.

On October 5, 2018, Judge Lanzillo issued a Magistrate Judge's Report and Recommendation ("R&R") recommending that Defendants' motions to dismiss be granted because neither Defendant Lubahn nor Defendant Smith is a state actor. In addition, Judge Lanzillo recommended that Defendant Lubahn's motion to strike be denied as moot. [ECF No. 38]. In so doing, Judge Lanzillo understandably viewed Plaintiff's amended complaint [ECF No. 35] as a proposed amendment, and appropriately found the same to be futile because it "failed to cure any of the defects in Plaintiff's original pleading, particularly as they pertain to the lack of a state actor." (ECF No. 38, at p. 8). As a result, Defendant Lubahn's motion to strike was found to be unnecessary. On October 22, 2018, Plaintiff filed Objections to the R&R [ECF No. 40].


After de novo review of the complaint and documents in the case, together with the report and recommendation and objections thereto, the following order is entered:

AND NOW, this 9<sup>th</sup> day of November, 2018;

IT IS HEREBY ORDERED that the report and recommendation of Magistrate Judge

Lanzillo, issued October 5, 2018 [ECF No. 38], is adopted as the opinion of the court insofar as Defendants' motions to dismiss [ECF Nos. 22, 24] are GRANTED and all claims against Defendants Lubahn and Smith are DISMISSED, with prejudice. The Court, however, declines to adopt the recommendation to deny as moot Defendant Lubahn's motion to strike Plaintiff's amended complaint [ECF No. 37]. Because the proposed amendment was mistakenly docketed as an amended complaint and the four additional defendants were added to the caption, without leave of Court, appropriate action must be taken to strike the amendment. Thus, although the Court agrees with Judge Lanzillo's rationale for finding Plaintiff's amendment futile, it is compelled by circumstance to GRANT Defendant Lubahn's motion to strike amended complaint [ECF No. 37] for the reasons more fully set forth in the R&R (ECF No. 38, at pp. 8-9), and Defendants St. Vincent, UPMC, and the two unnamed Defendants are terminated from this case.

The Clerk is directed to mark this case closed.

  
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SUSAN PARADISE BAXTER  
United States District Judge

cc: The Honorable Richard A. Lanzillo  
United States Magistrate Judge